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Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner
v.
BOSTON CHAPTER, NAACP, ET AL.,
Respondents

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner
v.
PEDRO CASTRO, ET AL.,
Respondents

NANCY B. BEECHER, ET AL.,
Petitioners
v.
BOSTON CHAPTER, NAACP, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The underlying question presented by these cases goes beyond the validity of the particular district court orders that are being challenged:

> When there has been a judicial finding of unlawful employment discrimination, does the 14th Amendment to the United States Constitution or Title VII of the 1964 Civil Rights Act categorically prohibit the district court from issuing a remedial order that accords preferential treatment to minorities who are not victims of the unlawful discrimination, or that is contrary to a *bona fide* seniority-based layoff system?

The National Education Association will address this question.

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

The National Education Association (NEA) moves this Court for leave to file the accompanying brief *amicus curiae* in support of respondents.

STATEMENT OF INTEREST AND REASONS FOR GRANTING MOTION

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principle objectives of NEA, as set forth in its Charter, is "to elevate the character and advance the interests of" educational employees. Toward this end, NEA and its affiliates engage in collective bargaining and otherwise represent these employees in dealing with their employers regarding terms and conditions of employment.

NEA believes that the seniority principle provides an objective and equitable standard on which to base employment decisions, including decisions regarding layoff. On a policy level, this belief is reflected in various resolutions adopted by NEA's highest governing body, the Representative Assembly; in practice, it is reflected in the efforts of NEA and its affiliates to incorporate the seniority principle into policies establishing terms and conditions of educational employment.

NEA's commitment to the seniority principle is strong, but it is not absolute. NEA believes that there is at least one situation in which a rigid application of the seniority principle does not provide an appropriate basis for making employment decisions and that some compromise in the principle is necessary. This is when, because of racial discrimination, the percentage of minorities in the workforce is significantly below the percentage in the relevant labor market. Although it would be preferable if the effects of this discrimination could be elimi-

nated simply by ending the discriminatory practices and utilizing employment practices that treat people equally regardless of race, this is not always possible. Affirmative action programs, which take conscious account of race, may be necessary to achieve true equal employment opportunity.

NEA's commitment to affirmative action in the above situation likewise is reflected in resolutions of its Representative Assembly, particularly Resolution E-13. After reaffirming NEA's support for seniority and other objective criteria as a general matter, the resolution concludes with a recognition of the fact that it "may be necessary to give preference in the recruitment, hiring, retention and promotion policies to certain racial groups . . . to overcome past discrimination." Pursuant to this resolution, NEA and many of its affiliates have been involved in the development and implementation of affirmative action programs that accord preferential treatment to minorities in various aspects of the employment relationship.

NEA believes that the choice between strict seniority-based employment decisions and decisions that reflect some accommodation of affirmative action is best made voluntarily by the employer and the employee organization through collective bargaining or other forms of dialogue. Where, however, there has been a judicial finding that the underrepresentation of minorities in the workforce is attributable to unlawful discriminatory practices by the particular employer, a federal court should be able to include in a remedial order racial preferences in hiring. Moreover, if necessary to preserve the progress that has been made as a result of such preferences, the court also should be able to accord preferential treatment to minorities when layoffs become necessary. Since this Court is being asked to decide in the instant cases whether a preference of the latter type is permissible under the Fourteenth Amendment to the United States Constitution and Title VII of the 1964 Civil Rights Act, NEA has a substantial interest in their outcome.

NEA has participated in prior cases involving affirmative action programs that accord preferential treatment to minorities in employment and other contexts, including *University of California v. Bakke* and *United Steelworkers v. Weber*. As a result of this participation, NEA has acquired an understanding of the issues presented in the instant cases, and the analysis in its brief *amicus curiae* will be of assistance to this Court in deciding them.

And, finally, because NEA appears to be the only employee organization that seeks to file a brief *amicus curiae* in support of respondents, it can provide a perspective that this Court otherwise would not receive.

CONCLUSION

For the foregoing reasons, NEA's motion for leave to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the National Education Association (NEA) is set forth in that motion.

SUMMARY OF ARGUMENT

When a district court determines that a public employer has engaged in unconstitutional discrimination in employment, the court's duty is to fashion a remedy that both ends the discrimination and eliminates its effects. Race conscious numerical requirements (hereinafter "racial preferences") are not prohibited by the Constitution and are a necessary component of such a remedy in certain cases. Specifically, racial preferences are sometimes necessary simply to put a stop to the discrimination. In addition, they may be necessary to make clear to minorities that the discrimination has ended and that they will be offered equal opportunity for employment, and to assure to those minorities who are employed a working environment that is free from racial discrimination, tension and harassment. Further, racial preferences serve the societal interest in achieving the ethnic composition of the workforce that would have existed but for the unlawful discrimination. (Section I(A)).

Although the racial preferences that have been sanctioned in employment discrimination cases usually have involved hiring, as opposed to layoffs, the rationale for the hiring remedies also justifies the use of such preferences in layoffs, particularly when necessary "to ensure that [hiring] relief already ordered not be eviscerated by seniority-based layoffs." *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 974-75 (1st Cir. 1982). To the extent that layoffs present certain special factors, they pertain not to the scope of the district court's remedial power, but to its exercise of discretion in weighing all of the relevant factors. (Section I(B)).

These cases cannot be disposed of without deciding whether racial preferences may be used to remedy unconstitutional employment discrimination on the ground that the district court's original findings of constitutional violations have been undercut by intervening changes in decisional law. Inasmuch as petitioners did not challenge those findings under the procedure provided in Federal

Rule of Civil Procedure 60(b), the findings must be accepted as fully operative for purposes of this proceeding. (Section I(C)).

The language and purpose of Title VII suggest a remedial authority at least as broad as that in constitutional cases. There is no merit to the arguments of petitioners and their supporting *amici* that Section 703(h) of Title VII prohibits the district courts from ever according preferential treatment that is contrary to the operation of a *bona fide* seniority system; or that Section 706(g) bars any remedy that gives a preference to non-victims of the unlawful discrimination.

This Court's decision in *Franks v. Bowman Transportation Co.* makes it clear that the purpose of Section 703(h) is to define what is and is not an unlawful employment practice. That section does not restrict the power of the district courts to fashion an appropriate remedy once unlawful discrimination, independent of the operation of a seniority system, has been found to exist. (Section II(A)).

Section 706(g), on the other hand, *does* govern the remedial power of the district courts, but it does not prohibit preferential remedies benefiting non-victims of the unlawful discrimination. Ample support for this proposition is found in the language of Title VII as originally enacted in 1964, and this was the view taken by the lower federal courts. Any doubt that may have existed regarding the point was conclusively dispelled in 1972 when Congress amended the 1964 statute in a number of respects. The legislative history of the 1972 amendments indicates that Congress was fully aware of the court decisions under the 1964 Act regarding the scope of the district courts' remedial power. It not only approved those precedents, but amended Section 706(g) to broaden the courts' power. (Section II(B)).

And, finally, the Justices of this Court who have spoken to the question—in *Regents of the University of California v. Bakke* and *Fullilove v. Klutznick*—have in-

dicated that remedial orders according racial preferences under Title VII need not be restricted to identified victims of discrimination. This is, moreover, the unanimous view of the lower federal courts. (Section II(C)).

ARGUMENT

I. A JUDICIAL REMEDY FOR UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION MAY INCLUDE RACIAL PREFERENCES DESIGNED TO PROTECT MINORITY EMPLOYEES AGAINST LAYOFFS.

A. Racial Preferences May be Necessary to End Unconstitutional Employment Discrimination or Eliminate Its Effects.

Our analysis begins with two principles of constitutional law established by the decisions of this Court:

First, upon a finding of discriminatory practices in violation of constitutional rights, the district court has the responsibility to fashion a remedy that both will end the discrimination and "eliminate [its] effects." *Milliken v. Bradley*, 433 U.S. 267, 283 (1977). "The court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Second, numerical requirements based on race are permissible in formulating a remedy for unconstitutional discrimination. *North Carolina State Board of Ed. v. Swann*, 402 U.S. 43, 46 (1971); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); *United States v. Montgomery County Board of Educ.*, 395 U.S. 225 (1971); *see also, Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). "When past and continuing violations are found, some ratios are likely to be useful starting points in shaping a remedy." *North Carolina State Board of Education v. Swann, supra*, 402 U.S. at 46.

In the employment context, these principles sustain racial preferences in cases in which they are necessary to an effective remedy for unconstitutional discrimination.

1. In several cases, lower federal courts have concluded that racial preferences were required simply to end discriminatory selections and assure minorities equal access to employment opportunities. *Paxton v. Union National Bank*, 688 F.2d 552, 574 (8th Cir. 1982); *Chisholm v. U.S. Postal Service*, 665 F.2d 482, 499 (4th Cir. 1981); *Association Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 269-70 (2d Cir. 1981); *Firefighters Institute v. City of St. Louis*, 588 F.2d 235, 240-41 (8th Cir. 1978). If there are no valid objective criteria on which to base hiring decisions and there is evidence of actual resistance to the employment of minorities, racial preferences surely would pass muster as part of a constitutional remedy "to insure against the risk of inadequate compliance," *Hutto v. Finney*, 437 U.S. 678, 687 (1978). This is particularly so when prior remedial orders without such preferences have failed to substantially increase the number of minority employees, *See, e.g., NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053, 1055-56 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974); *United States v. Wood Lathers Local 46*, 471 F.2d 408, 411-12 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

2. Apart from preventing discriminatory selections, it may be necessary to promptly introduce a significant number of minorities into the workforce to eliminate "the pre-existing discriminatory environment," *NAACP v. Allen, supra*, 493 F.2d at 619, and to offer minorities a non-discriminatory employment opportunity.

Several courts have noted the importance of racial preferences in overcoming the employer's reputation for excluding minorities, and securing a flow of minority applicants that is not restricted as a result of the prior dis-

crimination. For example, in *Morrow v. Crisler*, *supra*, the court of appeals found that the defendant's compliance with the district court's general prohibition against continued racial discrimination in the employment of members of the Mississippi Highway Patrol had not eliminated the effects of the discrimination. In the two-year period between the issuance of the district court's injunction and the hearing before the court of appeals, the defendant had hired every qualified minority who applied. Yet of the 91 new officers who were hired, only six were black, although the relevant labor market was more than one-third black. In remanding and instructing the district court to impose some form of racial preference in hiring, the court of appeals indicated that only such an order would put an end to the continuing effects of the past discrimination:

> The reputation of the Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices. To counteract this reputation, the District Court ordered the Patrol to conduct an affirmative recruitment program. The efficacy of this program is belied by appellees' assertion that qualified blacks are not in fact applying for positions . . . . [W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi . . . .

491 F.2d at 1056. *Accord*, *United States v. City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1344 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1340 (2d Cir. 1973).

Even if minorities know that the employer no longer will reject them for discriminatory reasons, they still may be unwilling to enter a work situation from which

minorities traditionally have been excluded. *See, Ford Motor Co. v. E.E.O.C.*, 102 S.Ct. 3057, 3061 (1982). Resentment or prejudice against the newcomers can lead to social ostracism or even harassment. *See, e.g., Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 924-45 (D.N.J. 1978). Only a remedy that provides for the early entry of a significant number of minorities into the workforce can overcome this unwillingness, and assure to those minorities who are employed a work environment that is free from racial discrimination, tension and harassment. *See, Taylor v. Jones*, 653 F.2d 1193, 1203-04 (8th Cir. 1981).[1]

The school desegregation cases provide an apt analogy. In the years immediately after *Brown v. Board of Education*, 347 U.S. 483 (1954), it was assumed that the constitutional rights of black children could be protected simply by permitting them to transfer to all-white schools. *See, e.g., Lockett v. Board of Educ. of Muscogee Co. School District*, 342 F.2d 225 (5th Cir. 1965); *Stell v. Savannah-Chatham Co. Board of Educ.*, 333 F.2d 55 (5th Cir. 1964). It soon became apparent, however, that despite the desire of many black families to secure for their children the benefits of an integrated education, they were unwilling to have them bear the brunt of the desegregation effort. Experience indicated that under so-called "freedom of choice" plans, only a handful of black

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[1] The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. . . . Quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit. For once an environment where merit can prevail exists, equality of access satisfies the demand of the Constitution.

***NAACP v. Allen, supra*, 493 F.2d at 621.**

children chose to enroll in previously all white schools. *See, e.g., United States v. Hinds Co. School Board*, 417 F.2d 852, 855-56 (5th Cir. 1969); *Hall v. St. Helena Parish School Board*, 417 F.2d 801, 808, 813 (5th Cir. 1969).

In the landmark case of *Green v. County School Board*, 391 U.S. 430 (1968), this Court held that black children must be afforded the opportunity not merely to attend an all white school, but to attend a non-racial school that is not infected by past discrimination. Reassignment, redistricting, zoning and other similar "quota-type" relief were mandated in order to achieve this. In subsequent decisions, this Court required school boards to reassign or employ minority teachers, because an integrated faculty is "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Bd. of Ed., supra*, 395 U.S. at 232. *See also, Rogers v. Paul*, 382 U.S. 198 (1965); *Bradley v. School Bd. of City of Richmond*, 382 U.S. 103 (1965).

As previously indicated, similar factors operate in employment discrimination cases. Although the immediate elimination of the continuing effects of past discrimination may be no more possible in employment than it is in education, racial preferences can expedite a process that otherwise might take years to complete. *Cf. Columbus Board of Educ. v. Penick*, 443 U.S. 449 (1979); *Swann v. Charlotte-Mecklenburg Board of Educ., supra*; *Green v. County School Board, supra.*

3. In the employment context, eliminating the effects of past discrimination means more than providing individual minority group members with non-discriminatory employment opportunities, although that certainly is an important element. There is a broader interest in eliminating the "condition that offends the constitution." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *accord, Rogers v. Herman Lodge*, 102 S.Ct. 3272, 3281 (1982). In appropriate circumstances, this interest may provide

an independent justification for a remedy that includes racial preferences.

A necessary effect of unconstitutional discrimination against minorities is their relative absence from the particular workforce. Racial preferences that are intended to achieve the ethnic diversity that would have existed but for the unlawful discrimination serve the societal interest in eliminating this effect. *See, NAACP v. Allen, supra,* 493 F.2d at 619. The importance of this societal interest may depend in any particular case on the nature, extent and duration of the unlawful discrimination, and the type of employment involved;[2] and it must be considered in conjunction with other relevant interests, including the rights and expectations of individuals outside the protected group.[3] Moreover, any racial preference is subject to the requirement that the person hired must fully meet the legitimate requirements of the job. *See, e.g., Taylor v. Jones,* 653 F.2d 1193, 1204 (8th Cir. 1981); *United States v. City of Miami,* 614 F.2d 1322, 1340 (5th Cir. 1980); *Crocket v. Green,* 534 F.2d 715, 719 (7th Cir. 1976). There undoubtedly are other factors to be considered in determining when the societal interest in achieving the racial composition of the workforce that would have existed in the absence of unlawful discrimination justifies the use of racial preferences. It is not our pur-

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[2] Undoubtedly, the interest in the elimination of the effects of discrimination in the hiring of police and fire personnel is greater than in other less visible and less vital areas of public employment. *Boston Chapter, NAACP v. Beecher, supra,* 679 F.2d at 977; *Detroit Police Officers' Ass'n. v. Young,* 608 F.2d 671, 695-96 (6th Cir. 1979); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, supra,* 482 F.2d at 1341.

[3] In *Carter v. Gallagher,* 452 F.2d 327 (8th Cir. 1972), *(en banc)*, for example, the court approved the use of a racial preference in hiring, but provided that it not entirely exclude non-minorities even for a short period. In *Bridgeport Guardians, supra,* 482 F.2d at 1341, the court disapproved the use of racial preferences in promotions, where the only violation was in hiring and where expectations of majority employees to promotions were otherwise well established.

pose to suggest what the proper balance might be in any particular case; but rather to suggest that this societal interest in eliminating the effects of unlawful discrimination is legitimate and is entitled to be weighed by the district court in fashioning an appropriate remedy.

B. The Rationale for Using Racial Preferences in Hiring Remedies Also Justifies Their Use in Connection with Layoffs.

Although racial preferences in employment cases generally have involved hiring, as opposed to layoffs, there is no principled reason why the need to eliminate the effects of unlawful discrimination would not, in appropriate circumstances, justify preferences in the latter regard as well. Indeed, hiring and layoffs are opposite sides of the same coin and preferential treatment may be necessary "to ensure that [hiring] relief already ordered not be eviscerated by seniority-based layoffs." *Boston Chapter NAACP v. Beecher, supra,* 679 F.2d at 974-975. *See, Morgan v. O'Bryant,* 671 F.2d 23 (1st Cir.), *cert. denied,* 103 S.Ct. 62 (1982); *Brown v. Neeb,* 644 F.2d 551 (6th Cir. 1981).

This is not to deny that there is an "instinctive" difference between hiring and layoff. When layoffs are involved, the "innocent" non-minorities can be more precisely identified and the adverse impact on them more readily gauged. But this difference does not relate to the scope of the district court's equitable power to provide a remedy for unconstitutional employment discrimination; it is rather a factor to be taken into account by the district court in considering the appropriateness of various alternative remedies "for the particular circumstances." *Swann v. Charlotte-Mecklenburg Board of Educ., supra,* 402 U.S. at 25.[4]

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[4] The equal protection argument asserted on behalf of the non-minority employees who were laid-off is simply the converse of the argument that the remedy is not lawful. Assuming that the orders of the district court are appropriate remedies for the racial discrimination found to exist, the resulting racial classifications pass

C. The Validity of the Underlying Findings of Constitutional Violations Remains Unimpaired for Purposes of this Proceeding.

It is the position of petitioners and several of their supporting *amici* that this Court can dispose of these cases without deciding whether racial preferences may be imposed by a district court to remedy unconstitutional discrimination. Specifically, they argue that the orders issued by the district court in 1981 cannot be sustained under constitutional standards because the legal basis for the original findings of constitutional violations has been undercut by this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976). This argument fails, however, because petitioners have not challenged the underlying judgments of liability pursuant to the procedure provided in Rule 60(b) of the Federal Rules of Civil Procedure, and accordingly, the findings of constitutional violations remain operative and unimpaired for purposes of this proceeding.

In *Pasadena City Board of Ed. v. Spangler*, 427 U.S. 424 (1976), the district court in 1974 refused to dissolve a 1970 desegregation order. This Court was asked to overturn the district court's decision on the ground, *inter alia*, that the underlying finding of unconstitutional segregation had been undercut by subsequent decisions of this Court. *See*, Brief for Petitioners, No. 75-164 (O.T. 1975), pp. 3, 12-13. Petitioners had not filed a motion in the district court to reconsider the judgment of liability, and this Court declined to consider the validity of that judgment, noting that "[a]ll that is now before us are the questions of whether the District Court was correct [in denying the motion to modify.]." 427 U.S. at 432. *Accord, id.* at 443-44 (Marshall, J., dissenting).

Here, the district court's findings that the employment practices of the Police and Fire Departments were in

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constitutional muster. *See, University of California v. Bakke, supra*, 438 U.S. at 301-02 (Powell, J.), 366-68 (Brennan, White, Marshall & Blackmun, JJ.).

violation of the Fourteenth Amendment and Section 1981 similarly became final when they were affirmed by the court of appeals in 1972 (police officers case) and 1974 (firefighters case), and no further review was sought. Notwithstanding subsequent changes in decisional law, these original judgments as to liability remain in effect "until . . . modified or reversed," *Pasadena City Board of Ed. v. Spangler, supra*, 427 U.S. at 439-40, "by orderly review." *Howat v. Kansas*, 258 U.S. 181, 190 (1922). And, as *Spangler* makes clear, having made no effort to set aside the district court's liability judgments, petitioners may not in this proceeding challenge the remedy on the ground that those judgments no longer are valid.

This is not simply a technicality without impact on the rights of the parties. To the contrary, if petitioners were allowed to bypass the procedure set forth in FRCP 60(b), and challenge the remedy based on intervening decisions of this Court affecting the predicate for the liability, the rights of respondents would be significantly impaired. Prior to 1976, unintentional discrimination was regarded as sufficient to establish a claim under the 14th Amendment. It was in this context that these cases were litigated and, accordingly, respondents made no effort to prove intentional discrimination.[8] If a proper attempt had been made to set aside the judgments of liability following the decision in *Washington v. Davis*, respondents would have had an opportunity to prove the existence of constitutional violations under the standard set

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[8] Judge Wyzanski pointed this out in his opinion in the police case. *See, Castro v. Beecher*, 334 F. Supp. 930, 935 n.4 (D. Mass. 1971).

In view of the state of the law, references in the original opinions of the court of appeals to "unintentional discrimination" mean only that there was no effort to prove intentional discrimination. *See, Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974); *Castro v. Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

forth in that case. And, as the court of appeals observed, "[i]t is by no means clear that [the] decisions . . . should have been different under the new standards." 679 F.2d at 971.

It likewise is speculative whether petitioners even would have been allowed to challenge the district court's underlying liability judgments had they attempted to do so when the layoff question was before the district court in 1981. A motion to set aside a judgment pursuant to FRCP 60(b)(5) or (6) must be made "within a reasonable time," as determined on the basis of all relevant circumstances. *See, e.g., Smith v. Missouri Pacific R.R. Co.*, 615 F.2d 683, 684-85 (5th Cir. 1980). *Washington v. Davis* was decided in 1976, and the district court well might have concluded that a motion made some five years later was not "within a reasonable time," particularly since most of the relevant events would by that time have taken place some ten years earlier.

Petitioners and certain of their supporting *amici* attempt to circumvent the finality of the original liability judgments by focusing solely on the district court's 1981 order. State petitioners, for example, concede that *Washington v. Davis* did not destroy "the constitutional predicate for the relief originally granted by the district court," Brief at 54, but contend that the court's 1981 order is affected because it "extended" the original relief ordered in the cases. *Id.*[8]

The thrust of this argument is that, as a precondition to any modification of the outstanding injunctive orders to account for new circumstances, respondents were required to reestablish petitioners' liability *ab initio*. This Court has held, however, that a plaintiff is entitled to

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[8] *See also*, Brief *Amici Curiae* for American Federation of Labor-Congress of Industrial Organizations and the Public Employee Department, AFL-CIO, at 3-4.

modify an outstanding injunction simply by showing, as was done here, that the modification is necessary to effectuate its original purpose. *See, United States v. United Shoe Corp.*, 391 U.S. 244 (1968); *Chrysler Corporation v. United States*, 316 U.S. 556, 562 (1942); *accord, King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (Friendly, J.) Inasmuch as any other rule would provide for needless relitigation of underlying liability issues, the burden plainly and properly is on the defendant to raise any question that may exist as to the liability findings, and to do so in a manner that allows for response and detailed consideration.

In sum, having failed to take the proper steps to set aside the district court's original findings that the Boston Police and Fire Departments engaged in unconstitutional discrimination, petitioners may not now, on the basis of intervening decisions of this Court, challenge the orders designed to remedy the effects of that discrimination. Only the remedy question is now before this Court. For the reasons set forth in this Part of our brief, a district court has discretion to impose a remedy for unconstitutional employment discrimination that includes racial preferences.

II. RACIAL PREFERENCES THAT ALTER BONA FIDE SENIORITY RIGHTS AND BENEFIT NON-VICTIMS MAY BE INCLUDED IN REMEDIAL ORDERS UNDER TITLE VII.[7]

Congress' principal purpose in the enactment of Title VII was not simply to provide a remedy to persons who

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[7] In this section of the brief we respond to the contention of petitioners and supporting *amici curiae* that Title VII does not permit a district court to issue an order that alters *bona fide* seniority rights or accords a racial preference to non-victims of the statutory violation. It is important to emphasize, however, that this question is not essential to the disposition of these cases if this

individually had been denied employment opportunities. As this Court explained in *United Steelworkers v. Weber*, 443 U.S. 193 (1979):

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semiskilled jobs." *Ibid.* (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7379-7380 (remarks of Sen. Kennedy) . . . . "[T]he relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. As Senator Clark told the Senate:
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> > "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." *Id.*, at 7220.
>
> Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream

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Court concludes that the challenged orders constitute an appropriate remedy for the constitutional violations found to exist. In this event, Title VII could affect the outcome *only* if it somehow affects the authority of a district court to use racial preferences to remedy violations of the 14th Amendment. This clearly is not the case: the limitations that Title VII places on the remedial power of a district court refer only to remedies that may be imposed for violations of Title VII itself, and we do not understand any of the petitioners or *amici curiae* to contend otherwise.

> of American society—could not be achieved unless this trend were reversed.
>
> . . . [I]t was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

443 U.S. at 202-03.[8]

As the discussion in Part I of this brief indicates, racial preferences can play a vital role in achieving the exact purposes that this Court has identified as underlying Title VII. This Court, moreover, has described the remedial authority of the district courts in Title VII cases in the same broad terms applicable to remedies for constitutional violations. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976). It follows, therefore, that racial preferences appropriate to remedy unconstitutional employment discrimination may also be used to remedy a statutory violation *unless* there is something in Title VII that dictates a contrary result. Petitioners and their supporting *amici* argue that Sections 703(h) and 706(g) do so dictate. As we demonstrate below, the language and legislative history of these provisions point in precisely the opposite direction.

A. Section 703(h) of Title VII Does Not Bar Remedies that Alter Seniority Rights.

Section 703(h) of Title VII, as amended, 42 U.S.C. § 2000e-2(h), provides in pertinent part:

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[8] The "secondary purpose" of Title VII is to make whole victims of unlawful discrimination. *Ford Motor Co. v. EEOC*, *supra*, 102 S.Ct. at 3065.

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

Petitioners and several supporting *amici* argue that this provision bars any district court order which requires that layoffs be made other than on the basis of strict seniority as provided in Mass. Gen. Laws c. 31, § 39.

This argument is foreclosed by this Court's decision in *Franks v. Bowman Transportation Co., supra.* In *Franks*, this Court explicitly held that § 703(h) does not act as a limitation on a district court's power to remedy a violation of Title VII:

> On its face, § 703(h) appears to be only a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g) . . ., in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g).

424 U.S. at 758-59 (footnote omitted). *Accord, id.* at 781-82 (Powell, J., concurring in part and dissenting in part.) Nothing in the statute itself or the opinion of the Court suggests that the definitional character of § 703(h) changes because a remedial order benefits non-victims of discrimination rather than identified victims. It is as inapplicable in one case as in the other.[9]

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[9] Although Section 703(h) does not apply in this case, this is not to say that the policy it expresses—protection of seniority rights—is of no significance. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 781-82 (1976) (Powell, J., concurring in part, dissenting in

B. Section 706(g) of Title VII Authorizes Racial Preferences that Benefit Non-Victims.

The provision of Title VII that governs the remedial power of the district courts is Section 706(g), as amended, 42 U.S.C. § 2000e-5(g). The language and legislative history of this provision support the authority of a district court to impose racial preferences in appropriate cases.

1. The text of Section 706(g) as enacted by Congress in 1964, and prior to its amendment in 1972, was, in pertinent part, as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . ., the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Although the section broadly authorizes "such affirmative action as may be appropriate," and thus seems explicitly to support preferential remedies in appropriate cases, *amici* AFL-CIO and PED argue that the last sentence of the section (which was not changed in 1972) precludes

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part). This policy must, however, be weighed against countervailing policies favoring the elimination of the effects of the unlawful discrimination.

the entry of relief that will benefit non-victims. To the contrary, this provision is limited to defining the rights of persons in court, complaining of prior adverse action by the employer and seeking compensatory or "make whole" relief.

The provision in question was modeled after a similar provision in Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c):[10]

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Congress in 1935 did not adopt this language to bar quota remedies for union members. Rather, Section 10(c), like Section 706(g), provides that only claimants found to have suffered adverse action on account of a prohibited form of discrimination are entitled to relief. *See, EEOC v. AT&T*, 556 F.2d, 167, 175-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). By contrast, beneficiaries of preferential hiring remedies are not claimants, are not typically persons who previously were denied employment, are not identified in the order and have no personal entitlement by virtue of the order. Rather, they are newcomers to the situation, selected by the employer, who happen to be members of the protected group. The purpose of the order is not to make whole these individuals, but to eliminate the discrimination and its effects. In a word, the two situations are distinct. The last sentence of Section 706(g) speaks to one, but not the other.[11]

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[10] This Court has noted that Section 706(g) is modeled on Section 10(c) of the National Labor Relations Act. *Albemarle Paper Co. v. Moody*, 422 U.S. at 419; *Franks v. Bowman Transp. Co.*, 424 U.S. at 769, 774-75 and n. 34.

[11] Similarly, the standards for individual relief articulated by this Court in *International Brotherhood of Teamsters v. United*

Congress in 1964 did address the question of racial preferences in Section 703(j), 42 U.S.C. § 2000e-2(j), which provides:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community.

This language supports the view that Congress did not intend to prohibit the imposition of racial preferences in all circumstances. If Congress had meant that no employer could be required to accord racial preferences for any reason, including as a remedy for unlawful discrimination, it would have so stated in Section 703(j). Instead, it limited the prohibition to situations in which such preferences would be founded solely on racial imbalance. Compare, *United Steelworkers v. Weber*, 443 U.S. at 204-07.[12]

States, 431 U.S. 324, 357-76 (1977), relate to the disposition of claims of individual entitlement. The Court did not, in *Teamsters*, address the distinct question of the propriety of racial preferences to overcome the effects of past discrimination.

[12] There are statements in the legislative history of the 1964 Act that indicate an intention to bar preferential hiring requirements even as a remedy for a proven violation. *E.g.*, 110 Cong. Rec. 1518 (Rep. Celler); 110 Cong. Rec. 6563 (Sen. Kuchel). But many other statements generally exhorting against "quotas" did not have that specific frame of reference. *E.g.*, 110 Cong. Rec. 7207 (Sen. Clark); 110 Cong. Rec. 7418-20 (Sen. Humphrey). Particularly in view of the failure of Congress expressly to prohibit racial preferences, an "interpretation [prohibiting such preferences] gives undue weight to a few isolated passages from among the thousands of pages of legislative history . . ." *University of California v. Bakke*, 438 U.S. 265, 342, n. 17 (1978) (Opinion of Justice Brennan,

2. Between 1965, when Title VII became effective, and 1972 when it was amended by Congress, numerous federal courts, including at least four courts of appeals, held that district courts have authority to use racial preferences in hiring as a remedy for proven discrimination. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. IBEW, Local 38*, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123, 132-33 (8th Cir. 1969); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Central Motor Lines, Inc.*, 325 F. Supp 478 (W.D.N.C. 1970); *United States v. Local No. 8, Intern. Ass'n of Bridge, S., O & R.I.*, 315 F. Supp. 1202 (W.D.Wash. 1970). We have found no case in which any court held that such a remedy was prohibited by the Act.

In the same period, the Secretary of Labor, in the implementation of Executive Order 11246, sought to impose on government contractors affirmative action plans, such as the Philadelphia Plan, which encouraged preferential hiring of minorities solely on the basis of their relative absence from the employer's workforce. In a series of cases, employers argued that these plans were violative of Title VII, and particularly Section 703(j), but the courts of appeals uniformly rejected these challenges, finding that Section 703(j) was a limitation only on what could and could not be required under Title VII. *Contractors Association v. Schultz*, 442 F.2d

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Justice White, Justice Marshall and Justice Blackmun). *See also id.* at 285 (Powell, J.).

In a number of cases, this Court has rejected restrictive comments in the 1964 legislative debates unsupported by statutory language, in favor of constructions considered more in keeping with the overall policy and purpose of the Act. *United Steelworkers v. Weber*, 443 U.S. 193, 205-08, n. 7 (1979); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-36 (1971); *County of Washington v. Gunther*, 452 U.S. 161, 101 S. Ct. 2242, 2249-51 (1981). *See Weber*, 443 U.S. at 209-10 (Blackmun, J., concurring).

159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts v. Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972).

In 1972, Congress enacted the Equal Employment Opportunity Act, 86 Stat. 103, amending the 1964 Act in a number of respects. There is specific evidence that, in the course of its consideration of the 1972 legislation, the judicial decisions imposing preferential hiring remedies were brought to the attention of Congress. Both the House and Senate Reports cite such decisions. H.R. Rep. No. 238, 92d Cong., 1st Sess. 8, n.2, 13, n.4 (1971), *reprinted in* United States Senate Committee on Labor & Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 at 68, n.2, 73, n.4 (Nov. 1972) (hereafter "1972 Legis. Hist."); S. Rep. No. 415, 92d Cong., 1st Sess. 5, n.1, 21 (1971), *reprinted in* 1972 Legis. Hist. at 414, n.1, 430. The issue of preferential hiring remedies was discussed on the floor of both the House of Representatives, see p. 27, n.14, *infra*, and the Senate, see pp. 25-27, *infra*. In the course of the debate, the decisions of the courts of appeals in *United States v. Ironworkers*, *supra*, and *Contractors Association v. Schultz*, *supra*, were printed in the Congressional Record. 1972 Legis. Hist. at 1048-70. See p. 26, *infra*.

The Conference Report on the bill that was enacted into law, stated:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Section by Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conference Report, 118 Cong. Rec. 7166 (1972). This Court has noted that this language "could hardly be more ex-

plicit," *Franks v. Bowman Transp. Co., supra*, 424 U.S. at 764, n.21, and has relied on it as evidencing Congressional approval of existing constructions of the 1964 Act. See *ibid.*; *id.* at 796, n.18 (Powell, J.); *University of California v. Bakke*, 438 U.S. 265, 354, n.28 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun). In view of Congress' specific consideration of the preferential hiring cases, "we have in this instance unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of § 706(g) remedial power conferred by the 1964 Act." *United States v. International Union of Elevator Const.*, 538 F.2d 1012, 1019-20 (3d Cir. 1976).

3. There is additional support for the conclusion that Congress adopted the foregoing interpretation in 1972. As part of the 1972 amendments, the following italicized language was added to Section 706(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back-pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*

It is manifest from the face of this amendment that it was intended to strengthen and broaden the remedial authority of the district courts. The origin of the amendment buttresses this conclusion.

When amendments to Title VII were offered in the Senate in 1971, the bill reported by the Committee on Labor and Public Welfare provided for enforcement proceedings before the Equal Employment Opportunity Commission, with the EEOC authorized to issue cease and desist orders enforceable by the federal courts. S.

Rep. No. 415, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 Legis. Hist. 410-97. In a statement of individual views contained in the Committee Report, Senator Dominick took the position, subsequently accepted by the Senate and enacted into law, that the cause of Title VII enforcement would be better served by authorizing the EEOC to file enforcement actions in federal district courts. 1972 Legis. Hist. at 493-96. Essentially, Senator Dominick argued that the federal courts would provide speedier, fairer and more effective hearings and determinations as to violations of Title VII rights, partly because they had direct injunctive authority. *Id.* at 495.

The Committee Report, with Senator Dominick's separate views, was filed on October 28, 1971. *Id.* at 410. Shortly thereafter, on November 8, 1971, Senator Dominick introduced an amendment to the Committee bill that provided for court enforcement of Title VII in actions brought by the EEOC. *Id.* at 553. This amendment included the changes in Section 706(g) noted above and later enacted into law. Since the debate between the supporters of the Committee bill and the supporters of the Dominick amendment focused on the question of the relative efficacy of EEOC versus court enforcement action, *id.* at 1481-1483; 1521-1557, it is reasonable to conclude that the changes in Section 706(g) proposed by Senator Dominick were designed to bolster his argument that the Act could be more effectively enforced through court proceedings. In the course of the debate on his amendment, Senator Dominick referred to the cases under the 1964 Act in which "minority hiring requirements at the expense, in many instances, of union hiring and seniority rights" were imposed, *id.* at 694, and argued that this power should be in the federal courts, not in the EEOC. *Id.*[13]

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[13] The only direct references to the Section 706(g) amendments appear in the Section by Section Analyses submitted by Senator

4. Further evidence of a Congressional intention in 1972 to approve the use of remedies under Title VII that went beyond the identified victims of unlawful discrimination is found in the rejection of an amendment introduced by Senator Ervin, which would have prohibited any "department, agency or officer of the United States" from requiring the employment of "persons of a particular race, . . . in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges." 1972 Legis. Hist. 1017. In support of his amendment, Senator Ervin explained that he intended to forbid the imposition of minority hiring requirements, by any name, in proceedings under Title VII or Executive Order 11246. *Id.* at 1042-45. Senator Williams, the Committee Chairman, yielded to Senator Javits, ranking minority member and a manager of the bill, to respond to the Ervin amendment. *Id.* at 1046-72.

Senator Javits' response, including reprinted material, consumes thirteen pages of the Congressional Record. 118 Cong. Rec. 1664-76. Noting that "the depth of this amendment is much greater than is apparent on the surface because it would purport not only to inhibit in given respects the officers of the United States but also the courts of the United States . . .," Senator Javits stated:

> [W]hat is sought to be reached is . . . the whole concept of "affirmative action" as it has been developed

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Williams in the Senate prior to passage, and by the Conference Committee. 1972 Legis. Hist. 1773, 1848. The comment with respect to Section 706(g) in the Senate analysis states in part:

> The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible.

Id., at 1773-74. Against the backdrop of Congress' awareness of the "minority hiring requirements" imposed under the 1964 Act, this statement can only be interpreted to reaffirm that authority.

> under Executive Order 11246 and as a remedial concept under Title VII.
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> [T]he amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices.

1972 Legis. Hist. 1046, 1048. In support of his remarks, Senator Javits specifically described several court decisions under Title VII in which racial preferences were imposed, and had printed in the Congressional Record the text of the decision of the Third Circuit in *Contractors Association v. Schultz*, and the decision of the Ninth Circuit in *United States v. Ironworkers, Local 86*, as well as a description of settlements in two cases brought by the Department of Justice which established racial preferences. 1972 Legis. Hist. 1048-70, 1072.

Senator Javits concluded his remarks against the Ervin amendment by noting:

> [T]his amendment . . . would torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which could assign specific percentages of minorities that had to be hired, and that could apply to government as well as private employers.

Id. at 1071.

Following Senator Javits detailed opposition to the amendment, Senator Williams added a few words of his own. Referring to the "examples of situations cited by the Senator from New York of the kind of situation that could be affected adversely," Senator Williams stated the "amendment raises the real threat of destroying any potential for effective law enforcement." He added:

> I am afraid—I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all of its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.

Id. at 1072. As the amendment related only to racial preferences, Senator Williams' statement expresses the view that, unless the courts had the power to impose such preferences, violations of the Act could not be effectively remedied. Following the Javits and Williams statements, the Ervin amendment was rejected by a vote of 44-22. *Id.* at 1074.[14]

C. The Use of Racial Preferences to Remedy Title VII Violations Has Been Approved By a Majority of the Members of this Court and by the Lower Federal Courts.

A majority of the Justices of this Court—indeed, all who have spoken to the question—have indicated that remedial orders under Title VII are not limited to identified victims of proven discrimination. In their joint opinion in *Regents of the University of California v. Bakke*, Justices Brennan, White, Marshall and Blackmun stated:

> Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII

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[14] There was no discussion on the floor of the House of Representatives of preferential remedies under Title VII. On the other hand, the use of such remedies under Executive Order 11246 was debated in the House and no action was taken. *E.g.* 1972 Legis. Hist. 222, 255-56, 260-61. Particularly, as a provision was added to Title VII dealing with another aspect of Executive Order enforcement, 42 U.S.C. § 2000e-17, it can be concluded that the failure of the House to prohibit racial preferences under the Executive Order (which are imposed without any finding of discrimination) supports the inference that such remedies for proven violations of Title VII were not disapproved.

> (Equal Employment Opportunities Act of 1972, 86 Stat. 103) a number of Courts of Appeals approved race-conscious action to remedy the effects of employment discrimination.
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> Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 732, 747-757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Conference Committee Report on H.R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII.
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> Such [Title VII] relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.

438 U.S. at 353, n.28, 363, 366. See also *id.*, 438 U.S. at 301-02 (Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring).

This is also the unanimous view of the lower Federal courts.[18]

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[18] In addition to the pre-1972 cases cited at p. 21, *supra*, see *Chisholm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1611 (1982); *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2233 (1982); *United States v. City of Buffalo*, 633 F.2d 643 (2d Cir. 1980); *Guardians Ass'n of New York City v. Civil Service Comm'n*

The conclusion that racial preferences going beyond proven victims of discrimination may be imposed to remedy a violation of Title VII draws further support from this Court's decision in *United Steelworkers v. Weber, supra.* In *Weber*, this Court held that Title VII presented no obstacle to the voluntary implementation by the employer and the union of a racial preference that was not directed toward victims of discrimination, even without an adjudication that there had been any unlawful discrimination:

> [T]he legislative history of Title VII and the historical context from which the Act arose . . . makes clear that an interpretation . . . that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected.

United Steelworkers v. Weber, supra, 443 U.S. at 201-02. If racial preferences can be used voluntarily, in the absence of any finding of unlawful discrimination and in the absence of any supervision by a court or other competent authority, surely the same remedy may be imposed by a federal court in order to eliminate the effects of a proven statutory violation.

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of the City of New York, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979); *EEOC v. Local 638*, 565 F.2d 31 (2d Cir. 1977); *EEOC v. AT&T*, 556 F.2d 167, 174-177 (3d Cir. 1977); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); *United States v. Int'l Union of Elevator Const.*, 538 F.2d 1012, 1019 (3d Cir. 1976); *Rios v. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States v. Wood Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Commonwealth of Pennsylvania v. Local Union 542, Intern. Union of Operating Engineers*, 488 F. Supp. 988 (E.D. Pa. 1980); *United States v. State of New York*, 475 F. Supp. 1103 (N.D. N.Y. 1979).

For all of the above reasons, Title VII should not be construed by this Court to prohibit remedies that include racial preferences benefitting non-victims of the unlawful discrimination.

CONCLUSION

There is nothing in the Fourteenth Amendment or Title VII that prohibits a district court from issuing a remedial order that includes racial preferences, even if such preferences are inconsistent with a *bona fide* seniority-based layoff system and the minorities who benefit from them are not victims of the constitutional or statutory violations that are the predicate for the order. The question of whether any particular order represents an appropriate exercise of a district court's power to remedy the continuing effects of past employment discrimination must be determined on a case-by-case basis after examining all of the relevant factors.

For the reasons set forth by respondents and the courts below, we believe that the orders challenged in these cases do in fact represent an appropriate exercise of the district court's remedial power, and the judgment of the court of appeals, therefore, should be affirmed.

Respectfully submitted,

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